No. 2504

United States Circuit Court of Appeals

for the Ninth Circuit

C. A. Smith Lumber & Manufacturing Company, a corporation,
Plaintiff in Error,

vs.

John A. Parker,
Defendant in Error.

Brief of Plaintiff in Error.

JOHN D. GOSS, Marshfield, Oregon,
Attorney for Plaintiff in Error.

WM. T. STOLL, Marshfield, Oregon, and
ISHAM N. SMITH, Mohawk Building,
Portland, Oregon,
Attorneys for Defendant in Error.

GAZOOT PRINTERY, MARSHFIELD, OREGON

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STATEMENT OF CASE.

Defendant in error brought his action for the breach of an alleged oral contract of employment. His complaint set forth that, while in the employ of of the plaintiff in error, he was injured in his left leg which injury he attributed to the negligence of plaintiff in error; that he was treated by the company physician in a negligent, careless and unskilful manner so that he became infected with blood poi-

soning necessitating the amputation of his right hand.

The complaint further alleges that the parties hereto entered into a settlement and agreement by the terms of which defendant in error signed a release in writing, discharging plaintiff in error from all liability for a specified sum, and that by the terms of such agreement (partly written and partly oral) defendant in error was to have employment as long as he wanted it. (T. pp. 5 to 10).

A demurrer was interposed on the grounds that the complaint did not state facts sufficient to constitute a cause of action; that it was contrary to the statute of frauds, and that it was contrary to Section 713 of Lord's Oregon Laws, because it was an attempt to vary the terms of a written instrument by parol evidence. (T. p. 25).

It was stipulated between the parties to the action that for the purposes of the demurrer the written release was as follows:

> "For the sole consideration of the sum of Four Hundred Ten 75-100 Dollars, this 25th day of Sept., 1909, received from C. A. Smith Lumber & Mfg. Co., I do hereby acknowledge full satisfaction and discharge of all claims, accrued or to accrue, in respect of all injuries or injurious results, direct or indirect, arising or to arise from an accident sustained by me on or about the 16th day of September, 1908, while in the employment of the above.
> $410 75-100
>
> Signed, J. A. Parker (Seal)
> Witness, Arno Mereen

Marshfield, Ore.
Witness, David Nelson,
Marshfield, Ore."

and should be taken as having been set out in the complaint (T. pp. 27-28).

The demurrer was overruled (T. p. 29) mainly on the ground that the release was a mere receipt and was not contractual in form and that parol evidence was admissible (T. pp. 30-31).

Plaintiff in error then filed its answer (T. p. 31) setting forth, among other things, the written release and alleging that the compromise and settlement therein contained was the only settlement or agreement had between the parties concerning any of the matters set forth in the complaint.

A reply was duly filed admitting that defendant in error signed the written release above set forth and denying the other allegations of the answer (T. p. 39).

A trial was duly had, resulting in a verdict for defendant in error, in the sum of $2,500.00 (T. p. 41) and a judgment for that amount was duly entered (T. p. 42).

At the trial, the defendant in error was permitted to testify that while in the employ of the plaintiff in error he received an injury, and subsequently made a settlement with said company through Mr. Mereen, the general superintendent, by the terms of which it was agreed that the company should pay him a certain sum of money, and give him employment (a job) in its mills as long as he wanted it and that as a part of said settlement, he signed the writ-

ten release set forth above (T. p. 95).

At the close of the plaintiff's case, defendant moved for a nonsuit and a dismissal on the ground that plaintiff had failed to make out a case and setting forth the reasons therefor, which motion was overruled, to which ruling the defendant excepted, and said exception was allowed (T. pp. 96 and 97).

The trial of said action was then adjourned until the following morning, and at said time the plaintiff in error notified the court that four of its material witnesses who expected to testify at the trial had been unavoidably delayed by an accident, and by reason thereof had failed to reach Portland in time for the trial, but were expected to arrive in Portland in time for the afternoon session, and for these reasons postponement of the trial until the afternoon of said day was requested, which motion the court overruled, to which ruling exception was taken and allowed (T. p. 97).

At the close of the testimony, the plaintiff in error renewed its motion for a continuance until the arrival of three important and material witnesses who had been delayed by an accident, and prevented from reaching Portland in time to testify, which motion was overruled, and an exception taken and allowed. Both sides then rested, and the plaintiff in error requested the court to instruct the jury to find a verdict in favor of the defendant and plaintiff in error, which instruction the court refused to give, and an exception was taken and allowed (T. p. 98).

Thereafter a motion for a new trial was duly

made upon the grounds that plaintiff in error was prevented from having a fair trial by the refusal of the court to permit an adjournment from the morning until the afternoon session because of the absence of material witnesses, and on the ground of newly discovered evidence, and on the further ground of the insufficiency of the evidence to support the verdict (T. pp. 43 to 94), which motion was denied (T. p. 94).

SPECIFICATION OF ERRORS

I.

The court erred in overruling defendant's motion for a nonsuit at the close of plaintiff's case.

II.

The court erred in overruling defendant's motion for a continuance or adjournment because of the absence of material witnesses who were detained by an accident while on their way to the place of trial.

III.

The court erred in overruling defendant's renewal of the motion for a continuance or adjournment on the ground of the absence of important witnesses who were detained by accident, and were by accident prevented from reaching the place of trial.

IV.

The court erred in overruling defendant's motion far a directed verdict in favor of the defendant.

V.

The court erred in refusing to instruct the jury as follows: "Before you may find a verdict for the plaintiff in this case, it is necessary that you find,

gentlemen of the jury, that there was a contract between the plaintiff and the defendant, whereby the defendant agreed for a consideration, to give the plaintiff employment, as long as the plaintiff desired it."

VI.

The court erred in refusing to instruct the jury as follows: "If you find that there was such a contract, you must also find that that contract was still in existence at the time when the defendant refused to employ the plaintiff."

VII.

The court erred in refusing to instruct the jury as follows: "In this connection, there has been evidence introduced going to show that the plaintiff, of his own accord, quit work for the defendant, and you are instructed that if you find from the preponderance of the evidence that the plaintiff of his own accord, quit working for the defendant, whether it was for the purpose of procuring higher wages, or whatever the motive may have been, then such act on his part terminated any contracts or liability on the part of the defendant to furnish the plaintiff with employment, and the discharge of the plaintiff by the defendant thereafter, or the refusal of the defendant thereafter to employ or continue to employ the plaintiff would not render the defendant liable in damages therefor. And if you find such to be the facts, your verdict should be for the defendants."

VIII.

The court erred in refusing to instruct the jury as follows: "In determining whether or not a contract for employment, such as the plaintiff claims herein existed, you are to be governed by the final agreement that was actually made in settlement of the claims of the plaintiff, and although the plaintiff may have been promised work by the defendant upon numerous prior occasions, such promises would be mere inducements, without consideration, and would not of themselves make a contract, nor would they by reason of having been repeatedly made during the negotiations, be for that reason alone a part of the contract of settlement."

IX.

The court erred in refusing to instruct the jury as follows: "The defendant under the pleadings herein, and under the facts as disclosed in the evidence, would not be responsible for the acts of the physician, Dr. Dix, nor for his failure to properly care for the injuries of the plaintiff, if he did so fail to care for the plaintiff, but under the relationship between the plaintiff and the defendant, it was incumbent on the defendant only to use proper care in the selection of a physician, and if they used reasonable care in selecting a physician and the physician so selected was one of good reputation and ability, the defendant's full duty was performed, and the defendant could not be held responsible for any specific acts of negligence or malpractice of which the physician might be guilty."

X

The court erred in refusing to instruct the jury as follows: "If you find from the preponderance of the evidence in this case, therefore, that the defendant had used due care in the selection of a physician, and that the claim of the plaintiff with regard to his injury was based upon the neglect or malpractice of the physician, then I instruct you that such a claim would not be a valid claim as against the defendant, and the settlement thereof could not be the basis of a contract or compromise between the plaintiff and the defendant, and any compromise of the defendant with regard thereto made to the plaintiff would be without consideration and not binding in law, and the failure of the defendant to keep such promise, even though you find such failure, would not render defendant liable in damages to the plaintiff herein."

XI

The court erred in giving the jury the following instructions: "Now there is some evidence on behalf of the defendant tending to show that after the plaintiff had worked for the defendant for a certain time, he quit or ceased work in order to obtain higher wages, and that he made, or attempted to make arrangements with some other employes not to take his place, in order to force the company to increase his compensation. Now, if he did that, that would be a breach of his agreement, if there was one. The company agreed, according to his statement, to give him employment as long as he wanted it, and

that obligated him to continue in the employment unless the cessation was due to some physical acts, I suppose, like illness or something of that kind, or by mutual consent. He might take a lay-off, if the company consented to it, or it was agreeable to them, but he couldn't use that contract as a means of forcing or compelling the company to increase his wages. Whether he did that or not, is a question of fact, there is a dispute as to that, and that also is a question.

XII.

The court erred in overruling defendant's demurrer to the complaint upon the ground that the complaint did not state facts sufficient to constitute a cause of action against the defendant.

XIII.

The court erred in overruling defendant's demurrer to the complaint on the ground set forth in paragraph separately numbered 1st in defendant's demurrer.

XIV.

The court erred in overruling defendant's demurrer to the complaint upon the ground set forth in paragraph separately numbered 2nd in defendant's demurrer.

XV.

The court erred in overruling defendant's demurrer to the complaint upon the ground set forth in paragraph separately numbered 3rd in defendant's demurrer.

XVI.

The court erred in overruling defendant's motion for a new trial upon the grounds of absence of material witnesses.

XVII.

The court erred in overruling defendant's motion for a new trial on the ground of absence of material witnesses who were prevented by accident from attending the trial.

XVIII.

The court erred in overruling defendant's motion for a new trial upon the ground of newly discovered evidence.

XIX.

The court erred in permitting the defendant in error to testify as follows:

> "We will give you a job as long as the company holds together, or as long as you want it." (T. p. 108).

"Q. Did you make this settlement?

A. We made this settlement.

Q. Did you accept that?

A. No, I didn't accept it at that time, so I said I would think it over and see. I said "How about this doctor bill; I got another doctor on it" I says to him. Well, he says "We will pay the doctor bill." I also put up about the medicine I used, another drugstore; he said they would settle for that too."

"Q. Now, at the time of your settlement or after

you came back, did you have any further conversation with Mereen? A. Yes sir.

Q. Talked this over with him again?

A. We talked this all over again.

Q. And do you remember the date that you signed this release that has been read?

A. Sometime in September, I think. I don't remember the date.

Q. And what were the ultimate promises, what were the promises that were made to you for the settlement, if any?

A. Well, to give me this doctor bill, hospital bill, and $200." (T. pp. 109-110)

"Q. What was the final settlement as to employment?

A. He partly promised me the position as foreman of the Bay City Mill when they started that up.

When the time came there was another man put in the position. I told him that I thought I would be able to handle that job, but this fellow had a better pull than I had, so he got it and they put me in this trimmer job.

Q. And what statement, if any, did they make to you at the time this release was signed about giving you a job and what kind of a job?

A. Said would always give me a job and something better than common work.

Q. That was part of the whole settlement?

A. Yes sir." (T. p. 110-111).

"Q. How long did they tell you before the settlement you might have the job for?

A. As long as I wanted it." (T. p. 111).

"Court: He is asking what work you did after the date of settlement.

A. This was after the date of settlement, this work.

Q. You filled various places there after that, did you?

A. Yes sir." (T. p. 111-112)

"Q. State whether you accepted that settlement on the understanding and promises he had made you as well as the other consideration?

A. Yes sir. It was the understanding I was to keep employed." (T. p. 112).

"Q. I thought I had asked you the question as to how long, if at all, they told you this job would last, when they made the settlement.

A. Told me it would last as long as I wanted the job.

Q. Now, that I understand was a part of the promises upon which you made the settlement?

A. Yes sir." (T. p. 116).

XX

The court erred in permitting Catherine B. Parker, mother of defendant in error to testify as follows:

"Q. Were you present on August 17th or 18th, 1913, at the office of the C. A. Smith Lumber & Manufacturing Co. at Marshfield, Oregon, at a conversation between Arno Mereen, the vice-president of the C. A. Smith Lumber & Manufacturing Company and John A. Parker, the plaintiff in this case,

you three and no other persons being present, at which a contract of employment entered into by the C. A. Smith Lumber & Manufacturing Company, on the one side, and John A. Parker, the plaintiff on the other side, for services in settlement of damages sustained by Parker, was discussed?

Mr. GOSS: Objected to on the ground that it is incompetent, irrelevant, and immaterial; that it is unnecessarily leading, even for an impeaching question, that it pre-supposes matters not proved, and which are the basis of this action; that it is intended as the foundation for impeaching questions and evidence, and that as such it is improper in that it does not properly identify the conversation referred to, nor comply with the statutory requirements for such a question.

A. I was present at such conversation.

Q. State what was said at that time.

Mr. GOSS: Same objection.

Q. As to my recollection, the substance was concerning the employment of Parker. Mr. Mereen admitted that he had promised him employment on account of the damages to his hand.

Q. What was said by Mr. Mereen, if anything, as to the length of time Mr. Parker was to be employed?

Mr. GOSS: Same objection.

A. I understood while the mill was running.

Q. Was there a dispute between them as to the length of time that Mr. Parker was to be employed, and if so what was said on that subject?

Mr. GOSS: Same objection, and the further objection that it calls for a conclusion of the witness, and is leading.

A. Parker said, Mr. Mereen, you promised me work as long as I lived. Mereen said, As long as there was work. Well, Parker said, As long as I wanted it.

Q. What did Mr. Mereen say to that?

A. Mereen said, as long as you wanted it." (T. pp. 247-248).

XXI.

The court erred in instructing the jury as follows:

Now, at the outset, it is important to understand that this is not an action to recover damages for the injury that the plaintiff received, as it is not the province of this court, or the jury in this case to undertake to adjust or settle that matter. It is important, however, for the plaintiff to show that there was a claim made by him to the company for compensation on account of that injury, and that that claim was settled and adjusted by the payment of a certain sum of money, and the agreement on the part of the company, as a part of the contract of settlement that he should be employed as long as he wanted employment, and to that extent, and to that extent only, the injury he received becomes important in this case. In other words, it is only necessary for the plaintiff to show a consideration for the contract, if there was one made, upon which he relies for recovery; and the considerations for such contract, from his standpoint, is that he had a claim,

and was making one against the company for compensation, and that claim was settled by this agreement. So that the first question for you to determine in the case is whether there was such a contract or not, whether the company ever agreed as a part of its settlement with the plaintiff for a claim made by him for compensation on account of his injury, that it would give him employment as long as he wanted it. If it made such a contract, or entered into such an agreement as a part of this settlement, between these people, of a claim made by the plaintiff, then it became a binding contract, and the company would be liable for a breach thereof, if it did breach it. If there was no such contract, then the plaintiff has no cause of action, and no ground of recovery in this case.

Now, as I have said, whether there was such a contract or not, is for you to determine from the testimony. You have heard all the evidence in the case, and it is the peculiar province of the jury to pass on that question. In doing so you should consider the relation of these parties, the circumstances surrounding this transaction, the written statement or receipt, or whatever it may be, given by the plaintiff at the time of this alleged settlement, his explanation thereof, the testimony of the other parties, the probability of a company entering into such a contract, and from all that, determine whether there

was such an agreement or not (T. pp. 257 to 259).

In order to constitute an agreement, it must be supported by consideration, and in order to find the consideration in this case, the contract must have been a part of the settlement of the claim made by the plaintiff against the defendant for damages, or compensation on account of the injury he received while in their service, or as a result thereof. * * * *

Now, if you find there was a contract or agreement by the company supported by a sufficient consideration, that it would give the plaintiff employment as long as he wanted it, and that he didn't himself voluntarily sever that relation, then it will be necessary for you to determine the amount of damages to which he would be entitled for a breach of the contract (T. p. 261).

POINTS AND AUTHORITIES

The chief contention of plaintiff in error on this appeal is that the release signed by defendant in error, as follows:

"For the sole consideration of the sum of Four hundred ten and 75-100 Dollars, this 25th day of September, 1909, received from C. A. Smith Lumber & Mfg. Co. I do hereby acknowledge full satisfaction and discharge of all claims, accrued or to accrue, in respect of all injuries or injurious results, direct or indirect, arising or to arise from an accident sustained by me on or about the 16th day of December, 1908, while in the employment of the above.

$410 75-100 (Signed) J. A. PARKER [Seal]

Witness, ARNO MEREEN,
Address, Marshfield.
Witness, DAVID NELSON,
Address, Marshfield.

was and is a complete bar to his action. This was the principal ground of demurrer in the court below, and was the principal ground of the motion for nonsuit at the close of plaintiff's case, the motion for a directed verdict at the close of the whole case, the objections to the evidence concerning the alleged contemporaneous oral agreement to furnish employment, and was the principal ground of objection to the instructions given to the jury, and those refused.

In presenting the law on this point, therefore, it may be considered particularly with reference to specifications of error Nos. XII and XV, and incidently with reference to Nos. I, IV, VIII, XIII, and XIX.

In its opinion on demurrer the court below held (T. p. 30-31) that the release given was a **mere receipt** because not **contractual in form**, and therefore could be contradicted by parol evidence to show a contemporaneous oral agreement to furnish employment so long as he wanted it.

The release in question begins with the words: "For the **sole** consideration."

This is equivalent to a covenant or agreement on the part of the defendant in error that the consideration stated in the release is the only consideration; that there is no other or further consideration

than that stated for his releasing his claim against the company. The consideration therefore is contractual in form, and the cases cited in the opinion are not applicable. Furthermore we propose to show that even if the release had not contained the statements that the consideration named was the sole consideration, the general rule as to varying written instruments by parol evidence would still have been applicable, and that the cases cited in the court's opinion do not correctly state the law according to the great weight of authority.

Our contention that the recital in the release that the sum named therein was the sole consideration constituted an agreement is directly sustained in a Massachusetts case, where the facts were as follows:

The plaintiff had sustained injuries while in the employ of defendant, had signed a release, and afterwards insituted suit. The release recited that

> "**for the sole consideration** of the sum of $50 and a doctor's bill of not exceeding $25."

plaintiff acknowledged full satisfaction and discharged all claims in respect to the accident. At the trial plaintiff offered in evidence conversations intended to show a different agreement. The trial court excluded the evidence, and these rulings were sustained on appeal, the court saying:

> "MORTON, J. We think that the rulings were right. The evidence which was offered tended to vary or contra-

> dict the written agreement, and was therefore rightly excluded. The release stated that the considerations recited were the 'sole considerations'. **Evidence of a consideration in addition to those contained in the release would have tended to directly contradict the express written agreement that the considerations named were the 'sole considerations.'** "
>
> Budro vs. Burgess, (Mass.)
> 83 N. E., 318.

In the case at bar, we think the court below overlooked the statement in the release as to the consideration named being the sole consideration, but even where the receipt or release contained no such statement, case after case holds that where the parties come to a written compromise or settlement of claims or liabilities parol evidence is not admissable to vary the terms thereof. The rule is thus stated in Cyc:

> "Where parties enter into a written compromise or settlement of claims or liabilities it is not subject to be varied or contradicted in its terms or effects by parol evidence."
>
> 17 Cyc, 621 and cases cited.

The difference between a receipt and a release or compromise is clearly pointed out by the New York Court of Appeals. The document was in the following form:

"Rec'd. Brookfield, July 11th, 1849, of Wm. D. Knap, forty dollars in full for the damage done to us by the stage accident of the 13th June last."

In its opinion, the court said:

"The instrument in question in this action is evidence of a compromise or settlement of the damages occasioned by the accident. It is not, technically, a receipt for money on account, which may be explained by parol, by showing that some particular item was not intended to be included; it was in full for damages occasioned by a particular transaction. It is, in effect, a release of the defendant from all liability occasioned by that transaction. This subject has been so elaborately discussed in various decisions that I deem it unnecessary to go fully into a consideration of the authorities. The case of Kellog v. Richards (14 Wend 116) is much like this; the receipt in that case was as follows: 'Received of Richards & Sherman, S. H. Addington's note, dated July 30, 1828, payable four months from date, for $431.40, as a compromise for the full amount of the note;' the amount of the note referred to was $1629.44. The court decided that the paper was

more than a simple receipt; it was an agreement of compromise, by which the plaintiff agreed to take Addington's note for $431.40, as a compromise for the full payment of defendant's note, and being made bona fide and without fraud, could not be contradicted by parol, while the court recognized the rule laid down in 1 Johns Cas. and numerous other authorities, that a receipt is not conclusive, but may always be inquired into. **The receipt in this case, although not expressed to be upon a compromise, clearly was so upon its face. It is, therefore, in the nature of a contract, and is so far within the general rule, that it is not liable to be varied by parol evidence.**

Judgment reversed and new trial awarded.

Coon v. Knap. 8 N. Y. 402 at 403 and 407.

In Connecticut, the Supreme Court of Errors said:

"A receipt is evidence that an obligation has been discharged; but a release is itself a discharge of it. A discharge is a fact, which cannot be explained away, as against anyone whose interests may have been affected by it. The rule that written agreements can

not be varied by parol operates in favor of those who were parties to it, whenever it was executed by the latter as the final embodiment of their agreement, and the parol evidence is offered to vary the legal effect of the terms in which it is expressed. The only purpose of such evidence can then be to give a new and unwarranted character to a past act. 4 Wigmore on Evidence, Secs. 2425, 2432, 2446."

Allen v. Ruland, 65 Atl. 138 at 140.

In a Massachusetts case the receipt was as follows:

"Amherst, January 1, 1886.

Received of F. L. Stone, for the town of Amherst, ten dollars in full of all demands for damage sustained on the highway near the house of Alden Cooley, on the evening of December 31, 1885.

(Signed) Emory A. Squires."

The court ruled that plaintiff would not be permitted to show that it was orally agreed that the release should apply only to the damages to his personal property and not to his personal injuries.

Squires v. Inhabitants of Town of Amherst, 13 N. E. 609.

In Ohio the Supreme Court held that a written instrument in the following terms:

"$15.50. Wooster, Ohio, May 13, 1890. This is to certify that I have

> this day settled with John Ely, and he has paid me all he owed me up to this date, and I have no claims against him of any kind whatsoever.
>
> Mrs. Wm. Jackson."

was not a mere receipt, but an agreement which could not be varied by parol evidence.

Jackson v. Ely, 49 N. E. 792.

To the same effect, see the next case in the same volume.

Cassilly v. Cassilly, 49 N. E., 795.

In a Colorado case, the release is set out in full and is in the form of a receipt. The Supreme Court said:

> "In so far as the evidence introduced on this issue tends to show that the release was given as a receipt for wages merely, it was incompetent, since the writing, in plain and unambiguous language, states that the $108 was paid in full settlement of the claim against the Union Pacific Railway Company on account of the injuries complained of, and in consideration of such payment expressly releases the company from any action therefor; and oral testimony is inadmissible to contradict or vary its terms."

Denver & R. G. R. Co. v. Sullivan. 41 Pac. 501 at 504.

In another case, plaintiff sued for injuries, and de-

fendant set up a certain receipt which was in the following form:

> "$6.50. Providence, R. I., August 15, 1898. Received of I. B. Mason & Sons, six and 50-100 Dollars in full settlement for damages sustained by falling into ice pit at Canal St. John Vaughan."

The court permitted the plaintiff to explain this receipt and to testify that when he received the money specified therein, he did not understand that it was in settlement of his claim, but was simply on account of his doctor's bill. Defendant excepted to the admission of this testimony.

The court said:

> "That an ordinary receipt given on payment of a sum of money is only prima facie evidence of the fact recited, and may, therefore, be explained or contradicted by parol, is doubtless the law. Goodwin v. Goodwin, 59 N. H. 550. Such a paper does not constitute a contract or agreement in writing between the parties, but is only the written acknowledgment of the payment of money, without containing any affirmative obligation upon either party to it; in other words, it is a mere admission of a fact in writing. 2 Beach, Cont. §383. Ryan v. Ward, 48 N. Y. 208. 8 Am. Rep. 539. Krutz v.

Craig, 53 Ind. 574. 2 Bouv. Law Dict. tit. 'Receipt.' Raymond v. Roberts, 2 Aikens, 204, 16 Am. Dec. 698. See also, Smith v. Ballou, 1 R. I. 496. Where, however, an agreement is embodied in the receipt, then, in so far as the receipt contains an agreement, it can not be varied or controlled by parol evidence, and hence is not open to explanation, unless for uncertainty or ambiguity in its terms; in other words it stands on the same footing in this regard as ordinary agreements or contracts in writing. Henry v. Henry, 11 Ind. 236, 71 Am. Dec. 354; Stapleton v. King, 33 Iowa, 28, 11 Am. Rep. 109. In the case at bar the written paper put in evidence by the defendants is not only a receipt acknowledging the payment of money, but it also contains an agreement that the money is received in full settlement for the damages sustained by the plaintiff in falling into the ice pit. It therefore falls clearly within the rule above referred to, and it was not competent for the plaintiff to testify that the settlement only included a part of his claim against the defendants. * * * * *

The receipt in the case at bar is clearly, in effect, a release of the defend-

> ants from all liability occasioned by the accident in question, and, no claim being made that it was obtained by fraud, the plaintiff is bound thereby."
>
> Vaughan v. Mason, et al, 50 Atl. 390 at pp. 391 and 392.

In another case the Court of Civil Appeals of Texas said:

> "Plaintiff offered to testify that at the time he executed the release he did not understand that he was injured other than as specified in said release, and none other was considered by the parties, and was not intended to be included in said release. Upon objection this testimony was not admitted, and the action of the court in excluding the same is assigned as error. There was no error in excluding this evidence. There was no ambiguity about the contents of the release."
>
> Moore v Missouri, K. & T. Ry. Co. of Texas, 69 S. W. 997, at page 1000.

In another Texas case the form of the action was substantially the same as in the case at bar, the plaintiff declaring on an agreement partly oral and partly embraced in a writing, the written portion being a release. Plaintiff alleged that the real consideration was not the release. The trial court excluded the testimony as to the oral agreement and on appeal their ruling was sustained, the ap-

pellate court saying:

> "Appellant's only assignment of error embraced in his brief questions the correctness of this action of the trial court; appellant's contention being that the proposed evidence was admissible in order to show the true consideration for said contract, and to show the independent stipulation making the contract entire. We do not think the rule which admits testimony of the character offered applies where such testimony would have the effect to destroy the purpose and effect of the written contract of the parties. The purpose and effect of the writing under consideration were to disavow and disclaim any right, title, or interest in or to the property in controversy on the part of the appellant and to acknowledge title thereto in appellee, and to lease such property from appellee to appellant for a definite period of time, which had expired when this suit was instituted. The effect of the testimony offered was to continue for all time in appellant the right to the possession and use of the property admitted by him in the writing to be owned by appellee, and tenancy of which he acknowledged under appellee, which, in our

opinion would contradict the terms of the written instrument and destroy its purpose and effect.

"The authorities cited and discussed by appellant in his brief do not, in our opinion, apply to a case like the present. We think it appears from the record that the evidence, exclusion of which is complained of by appellant, comes within the well established rule which prohibits the use of contemporaneous parol testimony to vary or contradict a written instrument."

Teague v. Ricks, 100 S. W. 794 at 795.

It will be remembered that in the case at bar the release is, for the purposes of the demurrer, made a part of the complaint (T. p 27).

In a case decided by the United States Circuit Court of Appeals for the Fifth Circuit the release was as follows:

"Form 715. Release. 5-90-5M

"Whereas, on and prior to August 14th, 1891, one Chas. Dearborn was an employe of the St. Louis & San Francisco R'y Company, and, as such employe, was engaged as engineer on engine 228, on the Texas Division, and whereas, said Chas. Dearborn received certain injuries, as follows, to wit: he was running engine No. 228 when main rod strap bolts broke, and thinking that

engine was going over, he jumped off, breaking his right arm above the elbow, for which said injuries said Chas. Dearborn does not make any claim of any class or character against said railway company, and admits that his injuries are not the result of any negligence on the part of said railway company: Now therefore, in consideration of the sum of one dollar ($1.00), in hand paid, and the further consideration of re-employment by said St. Louis & San Francisco Railway for such time only as may be satisfactory to said company, said railway company is hereby released from any and all claims that I, said Chas. Dearborn, claimant herein, ever had against said company, up to date, and especially released from any and all claims arising out of injuries specially set forth herein.

Given under my hand and seal this 26th day of Sept., 1891. (Signed) Chas. Dearborn. (Seal)."

The trial court admitted evidence which is set forth in the opinion to the effect that when the plaintiff signed the release they agreed to pay him for lost time, pay his hotel and hospital bills, etc.

On appeal, the Circuit Court of Appeals reversed the case, the court saying in part:

"In our view of this case, the only

assignments of error necessary for us to consider are those which involve the ruling of the court below in reference to the release pleaded and read in evidence by the defendant (now plaintiff in error). The assignments of error referred to are, in substance, the overruling defendant's demurrer to plaintiff's replication to the plea of release; the overruling defendant's motion to exclude from the jury the plaintiff's testimony to the effect that the defendant agreed to pay plaintiff's hotel and hospital bills, and his lost time, etc., as the consideration for the release; and the refusal of the court to instruct the jury, as requested by the defendant, that the written release precluded any recovery by the plaintiff; and that they should find for the defendant. The general principle is that contracts or agreements between parties, reduced to writing, deliberately executed or accepted, not bearing any evidence of incompleteness, are presumed to comprise the whole meaning, purposes and contracts of the parties. Parol evidence is not admissible to add to, alter, or vary the terms of such a contract."

After quoting from plaintiff's testimony, the court

goes on to say:

> "He thus seeks to alter, vary or add to his written agreement by parol evidence. This he cannot do. There is a distinction between a representation of an existing fact which is untrue, and a promise to do, or not to do, something in the future. In order to avoid a contract, the former must be relied on. The plaintiff does not pretend that there was any representation of an existing fact which was untrue, but the claim is that there was a promise to do something in the future. Bigham v. Bigham, supra. Our opinion is that the release was an effectual bar to this action, and that the trial court erred in its several rulings in reference thereto. Reversed and remanded."
>
> St. Louis & S. F. Ry. Co. v. Dearborn. 60 Fed. Rep. 886 at 881 and 882.

In another Circuit Court of Appeals case, (Sixth Circuit) the release is set forth in full and recites the consideration as **having been paid.** The court said:

> "It is, no doubt, well-settled law that so much of such an instrument as is in the nature of an acknowledgment of receipt, being the mere statement of a fact, and not containing terms of agreement, may, as a general rule, be

explained and contradicted by parol evidence. 1 Greenl. Ev. Sec. 305; 2 Whart. Ev. Sec. 1064; Weed v. Snow, 3 McLean, 265. But this instrument contained more than a mere receipt. It stated that, in consideration thereof, the owners of the Manitowoc released and forever discharged the Cayuga and her owners from all claims whatsoever on account of the injury resulting from the collision, except the claim, made by the owners for the loss of the use of the barge Manitowoc. It was a release under seal, of all claims resulting from the collision except the one saved, namely, that for the value of the use of the vessel during the time she was disabled. This agreement for release was in the nature of a contract, and could no more be disputed or controlled by parol evidence than any other instrument in writing witnessing an agreement of parties. 2 Whart. Ev. Sec. 1063; Wood v. Young, 5 Wend. 620; Stearns v. Tappin, 5 Duer, 294; Pratt v. Castle, 91 Mich. 484, 52 N. W. 52; Cummings v. Baars, 36 Minn. 353, 31 N. W. 449; Sherbourne v. Goodwin, 44 N. H. 276."

The Cayuga, 59 Fed., 483, at 485.

In a case decided by the Supreme Court of the

United States, four receipts are set forth in full all in substantially the same form, one of which is as follows:

> "U. S. Circuit Court.
> Sarah C. Shirley & als v. St'r Richmond.
> Received, New Orleans, July 3, 1876, from Mr. A. Chiapella, security on bond given by libellants in the above cause to respond to the cross libel filed by N. S. Green & al, claimants of the st'r Richmond, the sum of eleven hundred and sixty-six 66-100 dollars, in full satisfaction of a decree rendered against him in above entitled cause, and I hereby subrogate him to the rights of N. S. Green and owners of the st'r Richmond. (Signed) Kennard, Howe & Prentiss, Att'ys for Owners of Richmond."

Evidence to show another and different oral agreement was offered, and on objection the court refused to hear the evidence, to which ruling the plaintiff excepted. The Supreme Court sustained the ruling of the trial court, and held that such evidence was inadmissible, saying that the offer of the plaintiff in error to prove by parol another condition of the contract was rightly rejected because such parol evidence necessarily offered to contradict the written agreement of the parties; **that the payment and receipt of the money in pursuance of the agreement amounted to a release, so that there**

was a valuable consideration to sustain the contract.

Boffinger v. Tuyes, 120 U. S., 198.

The contention that the court below was in error in overruling the demurrer on the ground that the release was not contractual in form, is sustained in a Missouri case. The writing was as follows:

> "I hereby agree to accept, and do accept, of the Wabash Railroad Company, the sum of five thousand eight hundred dollars, as evidenced by my signature to the receipt annexed, in full satisfaction, release and discharge of all claims for damages that I now have, or may hereafter have against said company on account of personal injuries received by me in wreck of train No. 20, near Warrenton, Mo., also loss of time for services * * * on the lines of the Wabash railroad, on or about the 6th day of September, A. D. 1904, and also in full of all claims whatsoever for loss or damage to personal property in consequence of said accident. And it is further expressly agreed that in case suit has been instituted for said claim said suit shall be dismissed at the cost of no suit and said company forever discharged from all liability growing out of said injuries. $5,800.00. Received Jan. 5th, 1905, from the Wabash

> Railroad Company, the sum of five thousand eight hundred dollars, in full for the above settlement as per agreement recited. Ella Tate (Seal) J. T. Tate (Seal)."

Plaintiff contended that the statement of the consideration was not contractual and that the real consideration could be shown by parol evidence. The court said:

> "Where the statement of the consideration appears in a written deed or contract as a mere recital of a fact, it is open to explanation by parol evidence; but, where the language employed in the written instrument bespeaks the intention of the parties to treat the consideration as a contractual subject, the party afterward complaining no more is entitled to alter or vary such stipulation by parol evidence than he would be to change any of the other essential elements of the contract. It matters not that the expressed consideration be money or some other species of property, the real intention of the parties to be collected from the four corners of the written contract is the test to be applied. The mere recital in the instrument of the amount of the money consideration or an acknowledgment of the receipt of

> the money does not of itself evidence an intention to treat the amount of the consideration as one of the binding stipulations of the contract; but where, in addition to such recital or acknowledgment, terms are inserted which show a purpose to dispose, in the instrument, of the question of the amount and nature of the consideration, the subject must be held to have been regarded by the parties themselves as contractual."
>
> Tate v. Wabash Ry. Co.,
> 110 S. W. 622 at 623.

That the court below erred in overruling the demurrer in the case at bar is still further sustained in a Georgia case, where the receipt or release was as follows:

> "$1,750. Atlanta, Ga., July 18, 1905. Received of the Georgia Railroad (under which style the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company as lessees, operate the Georgia Railroad & Banking Company), through W. L. Kendrick, its agent, the sum of seventeen hundred and fifty dollars, ($1,750); and in consideration of said sum I hereby acquit, discharge and release the said Georgia Railroad & Banking Company, the Louisville & Nashville

> Railroad Company, and the Atlantic Coast Line Railroad Company for all claims for damages of every kind, nature, and character, growing out of or incident to personal injuries sustained by me while a passenger of said Georgia Railroad on its Washington Branch between the stations of Barnett and Sharon, in the derailment of the train known as No. 43, June 10, 1905."

Defendant demurred to a complaint which alleged an additional oral agreement and on appeal the demurrer was sustained.

Smith v. Georgia Railroad & Banking Co.,
62 S. E., 673 at p. 674.

It was contended in another Georgia case that the release given was a mere receipt which could be explained by parol evidence, the writing being set forth in full in the opinion. The trial court permitted plaintiff to testify concerning an alleged oral agreement to pay additional consideration to that expressed in the writing. On appeal the court held that to permit such evidence was reversible error.

Penn. Casualty Co. v. Thompson,
61 S. E. 829.

In the opinion overruling the demurrer (T. p. 31) the court rests its decision on three cases therein cited, namely, Pennsylvania Company v. Dolan, 32 N. E. 802, Allen v. Tacoma Mill Company, 51 Pac., 372, and Holmboe v. Morgan, 138 Pac. 1084. In view of the many authorities cited in this brief

which are exactly in point, especially those to which we shall refer presently, it seems unnecessary to endeavor to distinguish any of the three cases cited in the court's opinion except that of Pennsylvania Company v. Dolan. The other two cases are not authorities for the proposition to which they are cited. In the case of Allen v. Tacoma Mill Company, which was for the conversion of logs, the court held the document a mere receipt and rested its decision upon and quoted from a Massachusetts case (Stackpole v. Arnold, 11 Mass. 27) as follows:

> "For a receipt is not evidence of a contract, but of payment; and it has always been permitted to show that something short of the actual terms of the receipt was intended, it being conclusive only as to the amount of money paid, and not even for that, provided any **mistake** can be shown to have taken place in the adjustment between the parties."

Probably the doctrine laid down in this Massachusetts case is sound, especially where mistake or fraud is pleaded and proved, but we maintain that it is not applicable to the case at bar, even if we disregard the statement in the release given by defendant in error that the consideration recited is the sole consideration.

The case of Holmboe v. Morgan is clearly not in point. No question of a receipt or release is involved.

All that was held was that where a contract is partly written and partly oral, the oral portion, **unless within the statute of frauds,** may be shown by parol. In support of its decision the court cites (p. 1085) the cases of American Contract Co. v. Bullen Bridge Co., 29 Ore. 549, 46 Pac. 138, and Williams v. Mt. Hood Ry. & Power Co., 57 Ore. 251, 110 Pac. 490, 111 Pac. 17; both of which lay down the rule that when the terms of a contract are reduced to writing, parol evidence is not admissible to vary its terms, except where the writing is incomplete or ambiguous. These decisions, as well as all other Oregon decisions, but follow the Oregon statute which is substantially the same as the common law rule, and is as follows:

> "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases:
>
> 1. Where a mistake or imperfection of the writing is put in issue by the pleadings;
>
> 2. Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence

> of the circumstances under which the agreement was made, or to which it relates, as defined in section 717, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud. The term "agreement" includes deeds and wills as well as contracts between parties. (L. 1862; D. §682; H. §692; B. & C. §704.)"
>
> Lord's Oregon Laws, §713.

It is on the foregoing section that the third ground of demurrer in the case at bar is based. (Specification of Error No. XX.)

This brings us to the remaining case cited by the court below in the opinion on demurrer, namely, Pennsylvania Co. v. Dolan, 32 N. E. 802, an Indiana case which unquestionably is at variance with the great weight of authority in that it holds that the consideration recited in a written **release** as having been paid, may be varied by parol evidence to show another and different consideration. That is the Indiana doctrine, as is indicated by the cases cited in the court's opinion, the language of which is as follows:

> "The doctrine that all the oral negotiations are merged in the written contract and that the terms of the latter can not be varied by proof of a contemporaneous verbal agreement, does not apply. Even if the release were treated as the foundation of the action, the

> true consideration might be inquired into. This may be done even where the consideration expressed varies from, or is contradicted by the true one. Pickett v. Green, 120 Ind. 584, 22 N. E., Rep., 737; Levering v. Shockey, 100 Ind. 558; MacMahon v. Stewart 23 Ind. 590; Thompson v. Thompson; 9 Ind. 323; Rockhill v. Spraggs, Id. 30."

It will be noted that all the cases cited are Indiana cases, and we believe the doctrine enunciated is limited to that state.

But the court goes on to say:

> "**The exception to this rule** is where the parties have undertaken to specify the consideration in the writing, and where such consideration is **contractual in its nature.** In that case parol evidence to vary the terms of the agreement will not be admitted."

In the case at the bar the consideration was specified in the writing and was **contractual** in its nature, in that the parties **agreed that it was the sole consideration.**

So that even under the Indiana rule the release given by defendant was a complete bar to his action.

This contention is sustained in a much more recent Indiana case, where the following release:

> "The Indianapolis Union Railway Company to John J. Houlihan, Dr.: To amount in compromise of claim for

injuries received by him on August 8, 1895, at the Vandalia crossing of the Belt Railroad by his being struck by an engine of said company on said Belt Railroad while he was attempting to cross the track in the discharge of his duties as a telegraph operator in the employ of said company; said amount being in addition to all fees and charges payable to physicians and St. Vincent's Hospital for services and care rendered to said Houlihan on account of such injuries, which amount of fees and charges said company, as a part of said compromise, agrees to pay; and in consideration of the said agreement to pay said fees and charges and the amount herein mentioned as a cash payment to him, the said Houlihan, by his signature to the receipt below, does release and discharge the said company from any and all claims, demands, actions, and rights of action that he now has or may hereafter have by reason of said injuries or accident. $25.00. Approved. Baker & Daniel, Att'ys. Sept. 25, 1895.

Received of the Indianapolis Union Railway Company twenty-five dollars as payment in full of the above account, in consideration of which I release and

discharge said company as above specified. John J. Houlihan.

Approved. A. A. Zion, Superintendent. James M. McCrea, President."

was introduced in evidence and the Supreme Court of Indiana held that it could not be varied in its terms, the court saying in conclusion, after struggling valiantly to distinguish the case of Pennsylvania R. R. Co. v. Dolan:

> "The consideration on each side was the mutual covenants of the other. In the absence of any issue of fraud or mutual mistake, **appellee should not have been permitted to deny that the consideration for his release was correctly stated in the contract."**
>
> Indianapolis Union Railway Co. v. Houlihan, 60 N. E. 943.

The Indiana rule seems to be that where the consideration in a release is recited as **having been paid** another consideration may be shown by parol, while if it recites a consideration **to be paid**, parol evidence is admissible, a distinction without a difference so far as the underlying principle of law is concerned.

On the general proposition that a **release**, even where the consideration clause is a mere ackowledgement of the receipt of a certain sum of money, cannot be varied or contradicted by parol evidence, we submit the following cases:

Clark v. Mallory (Illinois) 56 N. E., 1099

VanBokkelyn v. Taylor (N. Y.) 62 N. Y. 105, where the release was as follows:

> "We, the undersigned creditors of George F. Taylor, of Brooklyn, State of New York, for value received, and in consideration of one dollar by him in hand paid to each of us, the receipt whereof is hereby acknowledged, do release him from all indebtedness due by him to us, either on book account, note of hand, or in any other way, bearing date prior to January 1st, 1868."

Harvey v. Denver & R. G. R. Co. (Colo) 99 Pac. 31.

Norfolk & W. Ry. Co. v. Mundy (Va.) 66 S. E. 61.

Leddy v. Barney (Mass.)2 N. E. 107.

The cases to which we shall next direct the attention of the court are squarely in point, each being an attempt to prove an oral contract **to furnish employment** where the release contained no such provision. In each case the consideration clause was in the form of a receipt or acknowledgment that the money given in consideration of the release had been paid.

In a North Carolina case, the plaintiff alleged that the defendant agreed to pay him in discharge of its liability, "**$6000.00 in money, and retain him in the services of the company in some**

position or place not requiring much bodily activity, and one adapted to plaintiff in his condition, as it should turn out to be, during his life"; that he was paid the said $6000.00, and continued in the defendant's employ until discharged. Defendant admitted that it agreed to pay the $6000.00 that it did pay the same, but denied the additional agreement to furnish employment, and alleged that the plaintiff executed his release, acquittance and discharge of liability on account of said injuries.

As in the case at bar, the consideration clause in the release was not in the form of an agreement, but was signed by the plaintiff only, and was in the following form:

> "$6,000. Know all men by these presents that I, A. B. White, of the city of Greensboro, N. C., for and in consideration of the sum of six thousand dollars, to me in hand paid, the receipt whereof is hereby acknowledged, do hereby release the Richmond & Danville Railroad Company, and the North Carolina Railroad Company, its lessor, from all claims upon them for damages received by me by a collision which occurred near the Yadkin river, about the 19th of August, 1884, and covenant with them, that I will not sue them, or either of them, for damages received in said collision. That by this

instrument I hereby release said company from any further liability or care of me on account of said accident. Witness my hand and seal, this 26th day of October, 1885. A. B. White. (Seal.)"

White v. Richmond & D. R. Co., 15 S. E., 197, at p. 198.

The court held that the evidence as to the contract to furnish employment was not admissible.

The Supreme Court of Kansas held in a case where the consideration clause of the writing was in the form of a receipt, and as in the case at bar, an attempt was made to show **an additional oral agreement to furnish employment.**

"The position taken by plaintiff in his reply to answer is that one comprehensive agreement of settlement was made; that one of the subjects covered was the matter of future employment; that the part of the contract relating to future employment should have been included in the written evidence of the agreement, but that it was omitted. There is no correspondence in the record between plaintiff and defendant's agent prior to January 10, 1899, the date of settlement, relating io the employment of the plaintiff by the defendant. Hence, any promise upon that subject inducing the contract was

necessarily oral, as the reply indicates. None of the subsequent correspondence on the part of the railway company can be construed into acknowledgment or recognition whatever of any previous obligation to re-employ the plaintiff. Therefore the only support of the fourteenth and fifteenth findings of fact is verbal testimony, and such is the theory of the reply.

The plaintiff's pleadings and the findings of the jury therefore present the simple case of an attempt to supplement a written contract by parol evidence, so as to extend its terms to cover a matter which the instrument itself excludes. Since the jury found that the defendant at all times denied any obligation to pay the plaintiff anything for his injuries, the instrument signed was not a mere unilateral acknowledgment or admission, but was a contract of settlement and release by way of compromise, which, if valid at all, became binding when the defendant paid to the plaintiff the sum of money stipulated for. The contract is full and complete in its terms, unambiguous, reasonable, and plain. The plaintiff signed it understandingly and voluntarily. It is therefore the meas-

ure of the rights of the parties to it. Milich v. Armour, 60 Kan. 229, 56 Pac. 1; Ehrsam v. Brown, 64 Kan. 466, 67 Pac. 867; Thisler v. Mackey, 65 Kan. 464. 70 Pac. 334; Rogers v. Perrault, 41 Kan. 385, 21 Pac. 287; Willard v. Ostrander, 46 Kan. 591, 26 Pac. 1017; A. T. & S. F. Ry. Co. v. Truskett, 66 Kan. 72 Pac. 562."

Atchison. T. & S. F. Ry. Co. v. Van Ordstrand 73 Pac. 113 at 116.

In a Texas case, an alleged **oral agreement to furnish employment** was pleaded as the consideration for a release in the form of a receipt, in the following form:

"In consideration of the sum of Fifteen ($15.00) dollars (and the assumption of Dr. Gaudlin's bill) the receipt of which is hereby acknowledged, I, B. F. Smith do hereby release the Rapid Transit Railway Company from any and all liabilities growing out of a certain accident and injuries sustained by my wife on or about June 8th, 1902, said injuries having been received by reason of a collision between two of the cars of the said Rapid Transit Railway Company, upon Commerce Street, Dallas, Texas, upon one of which cars my wife was a passenger. This release includes all injuries sustained whether

temporary or permanent, whether developed or hereafter to be developed. It is understood that this release shall be in no wise considered as an admission of liability on the part of said Rapid Transit Railway Company, and I hereby release for myself and said wife the said Rapid Transit Railway Company from any and all claims of liability whatever. (Signed) B. F. Smith."

On appeal the Supreme Court said:

"The release hereinbefore quoted is a contract definite in all its terms. It distinctly specifies the consideration for the release, and the testimony shows that it was paid. It clearly releases the defendant company from all further liability for the injuries which resulted to the wife of the plaintiff as a consequence of the accident. Being a written contract, containing the recital of the payment of one sum, and the promise to pay another as a consideration, it was not subject to be varied or contradicted by parol evidence. It was not susceptible of having imported into it by parol testimony that there was an additional agreement that the company was to give the plaintiff employment as a motorman, and that upon its failure to do so the release should

be void."

Rapid Transit Ry. Co. v. Smith, 86 S. W. 322, and 323.

In a Rhode Island case the plaintiff executed a release and afterward brought suit alleging that the company had also agreed in addition to the consideration recited in the release, **to continue him in its employment.** The court said:

> "The general rule that oral evidence will not be received to add to or vary the terms of a written contract applies to releases as well as other written instruments. If parties have put their contract into writing, the written instrument is to be regarded as the only evidence of the contract as finally concluded. Oral evidence of what was said or done during the negotiations will not be admitted either to contradict what is written or to supply terms with respect to which the writing is silent. The purpose of the rule is to enable parties to make their written contracts the only evidence of their undertakings, and to protect themselves against the hazard of uncertain oral testimony in respect to their engagements. A moment's consideration will serve to show how highly important the rule is to the security of the contracting parties, if, indeed, it

is not indespensable. The only exception to the rule is when the written contract is incomplete, and it is apparent from an inspection of the instrument that it does not embrace the entire contract. In such a case oral testimony may be resorted to to supplement, but not to vary or contradict what is written. Naumberg v. Young, 44 N. J. Law, 331; Thomas v. Scutt 127 N. Y. 133, 27 N. E. 961. The release in the case at bar does not appear on inspection to be incomplete. On the contrary, it is a formal instrument under seal, evidently designed to be a complete discharge of the defendant company from all liabiity to the plaintiff for the injury he had received. **It begins by acknowledging the receipt of $900** from the defendant in full settlement and discharge of any debt, demand, claim and suit, and of all debts, demands, claims and suits of whatever nature, which the plaintiff has against the defendant, and particularly in full settlement and discharge of any claim, demand, or suit which the plaintiff at the time of the release had against the defendant, either in law or equity, growing out of or arising from the injury or injuries sustained by the plain-

tiff on the day of the accident on High Street, in Providence; and goes on to release and discharge the defendant from all present and future liability to the plaintiff for the injury or injuries sustained, and agrees that the release may be pleaded in bar to any suit at law or in equity which may be brought by reason of such injury or injuries. The purpose to discharge the defendant from all liability subsequent to the release and the consideration paid for the extinguishment of liability could scarcely be more clearly expressed. In the face of so full and comprehensive a release the plaintiff cannot be permitted to urge that the defendant agreed, in addition to the $900 expressed as the consideration of the release, to give him employment, and pay him a sufficient amount of wages each week to support him and his family as he and they had been supported previously to his receipt of the injury, so long as he should live and be willing to remain in the employment of the company. White v. Railroad Co., 110 N. C. 456. 15 S. E. 197. To do so would be to permit the plaintiff by oral testimony to add to the terms of a written instrument, which is apparently complete in itself, a mat-

> ter concerning which the instrument is silent, and that, too, when in legal contemplation, the release is to be regarded as the only evidence of the contract of the parties as finally concluded. **The plea setting up the release in bar of the action is sustained,** and the demurrer to it overruled.
>
> Myron v. Union R. Co. 32 Atl. 165.

A recent Maine case is strikingly similar to the one at bar, even to the testimony, which is quoted at considerable length in the opinion. The cause of action was identical, namely, for the breach of an alleged oral contract **to furnish the plaintiff employment "so long as he could work."** While in defendant's employ he had sustained the loss of his right foot. No action was brought for his injuries, but he executed the following release:

> "In consideration of the sum of one thousand dollars ($1,000) to me in hand paid, the receipt whereof I herewith acknowledge, I, John Chaplin, of Topsham, Maine, for myself, my heirs and assigns, do hereby release Amos F. Gerald, E. J. Lawrence, A. B. Page, S. A. Nye, Henry M. Soule and Cyrus W. Davis, associates, and also the Portland and Brunswick Street Railway, from any claim by me of any name or nature in the past or at the present time, or that may arise in the

future, by reason of the accident occurring on the line of the Portland & Brunswick Street Railway during the summer of 1902, at or near Mallett's gulley, so called, in Freeport, Maine, in which accident I sustained the loss of my right foot; and in consideration of the above payment, Amos F. Gerald, for the associates, Cyrus W. Davis, Treasurer Portland & Brunswick Street Railway, and John Chaplin for myself, my heirs and assigns, agree together by our signatures herewith affixed that the above settlement shall be final and conclusive. Made in duplicate, this ninth day of February, A. D. 1903.

A. F. Gerald. [Seal]
Portland & Brunswick Street R'y,
By Cyrus W. Davis. [Seal]
John Chaplin. [Seal]"

In his action plaintiff alleged that at the time he executed the release, the defendants:

"promised him that if he would sign a certain acknowledgment of satisfaction, and accept the sum of $1000 in money, they on their part would pay him $1000 **and give him employment** at $65 per month **as long as he could work.**"

He further testified that he re-entered defendants' employ and continued until he was wrongfully

dismissed.

The testimony quoted in the decision, with the necessary change of names, would, in all its details, pass for the testimony in the case at bar. No exception had been taken, however, to the admission of the testimony, and the case came up on a motion for a new trial because the verdict was contrary to the weight of evidence. The motion was granted and in its decision the court said:

> "The general rule that oral evidence will not be received to add to or vary the terms of a written contract applies, we think, to such a release as the one above quoted. The only exception to the rule is found where from an inspection of the instrument it appears to be incomplete and not to embrace the entire contract. In such case resort may be had to oral testimony to supplement, but not to vary or contradict the written instrument.
>
> The instrument in the case at bar is not incomplete, but comprehensive, and appears to embrace an entire contract between the parties. It is not merely a receipt for money, which may be explained by parol. On the contrary, it is a formal release witnessing in plain and explicit terms an agreement discharging the defendants from all liability to the plaintiff for the injury he had received and 'which was to be final

> and conclusive.' The testimony of the plaintiff that the defendants agreed, in addition to the $1,000, expressed as a consideration for the release, to furnish him employment as long as he should be able to work, is, we think, inconsistent with and tends to vary and contradict the written instrument. Myron v. Union Railroad Co., 19 R. I. 125, 32 Atl. 165; White v. Richmond & D. R. Co., 110 N. C. 456, 15 S. E. 197; Horn v. Miller, 142 Pa. 557, 21 Atl. 994; The Cayuga, 59 Fed. 483, 8 C. C. A. 188; James v. Bligh, 11 Allen (Mass.) 4; Goss v. Ellison, 136 Mass. 503.
>
> The above authorities are cited not merely in support of the general rule, but as showing its applicability to the case at bar."
>
> Chaplin v. Gerald, 71 Atl. 712.

Another case exactly in point, and a very recent one (June, 1913) was decided by the Supreme Court of Arkansas. The plaintiff, an employe of defendant had received injuries, and negotiations for settlement had culminated in a written release, as follows:

> "Whereas, I, William Williams, of the county of Pulaski, state of Arkansas, was injured, at or near Argenta, Ark., on or about the 4th day of April, 1910, on a line of railway owned or

operated by the Chicago, Rock Island & Pacific Railway Company, while working for said company under circumstances which I claim rendered such company liable in damages, although such liability is denied by such railway company, and the undersigned being desirous to compromise, adjust and settle the entire matter, now, therefore, in consideration of the sum of three hundred dollars ($300,00) to me this day paid by the Chicago, Rock Island & Pacific Railway Company, in behalf of itself and other companies whose lines are owned or operated by it, I do hereby compromise said claim and do release and forever discharge the said Chicago, Rock Island & Pacific Railway Company, and all companies whose lines are leased or operated by it, their agents and employes, from any and all liability from all claims for all injuries, including those that may hereafter develop, as well as those now apparent, and also do release and discharge them of all suits, actions, causes of actions and claims for injuries and damages, which I have or might have arising out of the injuries above referred to, either to my person or property, and do hereby acknowledge full satisfaction of all such

> liability and causes of action. I further represent and covenant that at the time of receiving said payment and signing and sealing this release I am of lawful age, and legally competent to execute it, and that before signing and sealing it I have fully informed myself of its contents and executed it with full knowledge thereof."
>
> Williams v. Chicago R. I. & P. Ry. Co., 158 S. W. 967.

Subsequently, he was taken back into defendant's employ and later discharged and refused further employment. He then brought suit on an alleged verbal contract alleging that **as a part of the consideration for the release defendant was to furnish him employment during his lifetime.**

The court carefully reviewed the authorities, including the Indiana case of Pennsylvania Co. vs. Dolan, supra, and held that:

> "The contract before us contains more than a mere recital or acknowledgment of the amount to be paid as the consideration. The writing shows upon its face that it was a compromise of the differences between the parties concerning the subject matter stated and that the amount to be paid was a part of the contract. **That part of the contract constituted more than a mere receipt for the money paid, and it**

> **would be inconsistent with the express terms of the writing itself to prove an additional or further consideration."**
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> Williams v. Chicago R. I & Pac. Ry. Co., 158 S. W. 967 at 969.

In speaking of the case of Pennsylvania v. Dolan, supra, the court said that it was:

> **"The only case brought to our attention holding to the contrary."**

and that even in that case, the court recognized the general rule that:

> "Where the parties have undertaken to specify the consideration in the writing and where such consideration is contractual in its nature, parol testimony of additional agreement is inadmissible."

The court further held that it was error to charge the jury, in substance, that if the defendant, at the time of the settlement:

> "verbally agreed, in consideration of said release, to give the plaintiff permanent and steady employment at such work as plaintiff could perform in his then condition for the term of his natural life, at a stated compensation." (p. 968).

The applicability of this ruling to the case at bar is in connection with our specifications of error No. VIII and No. XXI. As bearing on this point see

also the case of Rapid Transit Ry. Co. vs. Smith, 86 S. W. 322 at 323, where the court said:

> "Upon the question of the release the trial court charged the jury as follows: 'If you find and believe from the evidence before you that, at the time the written release was signed by the plaintiff, the defendant company, by and through its agent, C. F. Freeman, promised the plaintiff that he should be re-employed by the defendant company, you will find for the plaintiff.' We think the charge of the court was erroneous, and that the error requires a reversal of the judgment."
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> Rapid Transit Ry. Co. v. Smith, 86 S. W., 322 at 323.

That this case of Pennsylvania Co. v. Dolan is not regarded as an authority is further shown in an opinion by the Supreme Court of Kansas in a case which was also on all fours with the case at bar, being an action to recover for the breach of an alleged oral contract of employment. Defendant answered, denying that there was any independent oral agreement and alleged that all the agreements and negotiations of the parties were reduced to writing and signed by them; that the consideration had been paid and the defendant released from all liability. The release is set forth in full in the opinion, the essential part being as follows:

> "Now, therefore, this agreement wit-

nesseth that in consideration of the sum of three hundred dollars ($300.00) paid by the said Armour Packing Company, the said Annie Militz does hereby release and discharge the said Armour packing Company from any and all liability," etc.

On appeal, the court said, after a careful review of the authorities:

"The plaintiff strongly relies on Pennsylvania Co. v. Dolan, 6 Ind. App. 109, 32 N. E. 802, and Harrington v. Railway Co., 60 Mo. 228, but the writings upon which the decisions are based in those cases are quite dissimilar from that in the case at bar, and **neither of them, as will be seen, was decided by courts of last resort;** and even in those cases the exception to the rule is recognized, that where the parties have undertaken to specify the consideration in the writing, and such consideration is contractual in its nature, parol evidence of other or different considerations will not be admitted. **The writing in the present case is so clearly contractual in character as to hardly admit of discussion,** and under the authorities, **parol proof of other understandings than those embodied in the writing can not be received."**

Milich v. Armour Packing Co.,
56 Pac. 1.

Still another case exactly in point was decided by the Supreme Court of Iowa. Plaintiff sued on an oral contract **to furnish him employment as long as he lived.** Defendant pleaded a written release. Although the release is not set forth it appears from the statement of facts that in consideration of $400.00 plaintiff had released defendant from all liability. The appellate court held that the trial court rightly excluded the testimony and directed a verdict for defendant.

Jessup v. Chicago & N. W. Ry. Co., 68 N. W. 673.

The release in the case at bar goes further than those in any of the last mentioned cases and distinctly provides that there is no other consideration than that expressed in the writing. Obviously an attempt to show another and different consideration directly contradicts the written agreement. The demurrer of the plaintiff in error should have been sustained; the defendant in error should not have been permitted to testify that there was an oral agreement to employ him; the court should have allowed the motion for a nonsuit at the close of the plaintiff's case; the court should have directed a verdict for defendant (plaintiff in error) at the close of the whole case; the court should have instructed the jury to disregard the evidence as to the alleged agreement to furnish employment. For any and all these errors, the judgment should be reversed.

In distinguishing between a **receipt** and a **release** upon a compromise or settlement of unliquidated demands, the Supreme Court of Minnesota said:

> "A 'receipt' may be a mere acknowledgment of payment of a certain sum of money, or it may also contain a contract; and, of course, the rule is very familiar that, so far as it goes only to acknowledge payment, it may be it contradicted by parol evidence that the payment was not made, but in so far as it contains a contract, it stands upon the footing of other written contracts, and can not be varied or contradicted by parol. Sencerbox v. McGrade, 6 Minn. 484, (Gil. 334); Wyckoff vs. Irvine; Id. 496 (Gil. 344); Morris v. St. Paul & C. Ry. Co., 21 Minn. 91."
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> "But where it contains anything in the nature of an agreement or stipulation **upon a compromise or settlement of disputed claims or unliquidated damages, that the one party shall receive and accept from the other a certain sum in acquittance and discharge of such claim, it is in the nature of a contract, and can not be varied or contradicted by parol,** but is conclusive upon the parties, in

the absence of fraud or mistake."

Cummings v. Baars, 31 N. W. 449 at 550.

Another matter to which we wish to direct the court's attention arises under Specifications of Error Nos. II and III, relating to the refusal of the trial court to grant an adjournment or continuance of a few hours because of the absence of material witnesses who were unavoidably detained by an accident while on their way to the place of trial by reason of which the plaintiff in error was deprived of their testimony (T. p. 221, p. 245). The three witnesses were Mathison, Rourke, and Dresser. They started in ample time to reach Portland in time for the trial but, as appears from their affidavits, (T. pp. 61, 63, 64) while going through the "canyon" their automobile broke down, and although they used every means in their power, they were unable to reach Roseburg in time to catch the train for Portland. After missing the train they tried to reach Portland in an automobile, but it again broke down, and they were compelled to wait at Drain for the next train and finally reached Portland at 4:35 P. M. (T. p. 64).

> "If a material witness starts in due time to attend a trial, and is delayed purely by accident, and is prevented thereby from reaching the place of trial until the trial has been concluded, and the party for whom the witness expected to testify is unsuccessful, and was not in fault in going to trial with-

out the witness, we think that ordinarily such party is entitled to a new trial."

Smith v. State Ins. Co. (Iowa)
12 N. W. 542, at 543.

Cited in Cyc 29, p. 861, in support of the following text:

"The unexpected absence * * * of a witness * * * from the trial where delay to secure his attendance was refused, may be ground for a new trial, if the movant was not guilty of negligence in failing to secure his attendance."

The following cases are also cited in support of the foregoing:

Smith v. Ledgerwood Mfg. Co.. 60 N. Y. App Div. 467, 69 N. Y. Suppl. 975.

Watterson v. Watterson 1 Mead (Tenn) 1.

Cliver v. Stephens, 3 U. C. Q. B. O. S. 21.

"So also the absence from the trial of a non-resident witness, who has been expected, on reasonable grounds, to attend, has been held sufficient cause for allowing a new trial."

29 Cyc, 861, citing

Cahill v. Hilton, 31 Hun. (N. Y.) 114, affirmed in 96 N. Y. 675.

In conclusion, we respectfully submit that it is wholly unnecessary and would serve no useful purpose to cite further cases to support the proposition

for which we are here contending, namely, that a release or compromise is on a different footing than a mere receipt and that in the case of Pennsylvania Co. v. Dolan and in the decision on demurrer of the lower court in this case, this underlying principle of law was lost sight of. Under these two decisions if the release had contained a **promise to pay** the consideration immediately after the signing instead of a recital that it **had been paid**, at the time of signing, it would be held to be **contractual in form.** This is a difference **in form** only and not in substance, and rests wholly upon a misapplication of legal principles. In closing we can do no better than to quote the language of the Supreme Court of Mississippi where this subject is most ably discussed.

> **"A release can not be contradicted or explained by proof, because it extinguishes a pre-existing right. But no receipt can have the effect of destroying per se any subsisting right. It is only evidence of a fact. The payment of the money discharges or extinguishes the debt. A receipt for the payment does not pay the debt. It is only evidence that it has been paid. Not so of a written release. It is not only evidence of**

the extinguishment, but is the extinguishment itself.''

Baum v. Lynn, 18 So. 428 at 430.

Compromises and settlements have always been especially favored by the law and are set aside with great reluctance. In the case at bar the release shows on its face that it was a complete compromise and settlement; that its purpose was to extinguish the liability of the one party for any and all claims of the other party for the consideration of the sum named, for that consideration and that only. There is no ambiguity or uncertainty in the writing; there is no element of mistake, fraud, duress, or the like. To hold that one may attempt to show by parol another and entirely different agreement merely because he actually received this **sole consideration** instead of receiving a **promise to pay it** is to violate one of the basic principles of the law and opens wide the door to fraud and perjury.

The judgment should be reversed.

Respectfully submitted,

JOHN D. GOSS,

Attorney for Plaintiff in Error.

Herbert S. Murphy,

Of Counsel.